89-1609

No. _____

IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1989

THE PEOPLE OF THE TERRITORY OF GUAM,

Petitioners,

v.

IRVIN IBANEZ
RAMON ALDAN CASTRO
PEDRO V. DALMAL
NORBERT BOTELHO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Ninth Circuit's review, for reversible error, of the trial court's instruction on reasonable doubt, despite the absence of contemporaneous objection, was contrary to the statutory law of Guam and the case law of this Court.

2. Whether the decision of the Ninth Circuit in the case of Guam v. Ibanez violated the statutory laws of Guam and the case law precedents of the this Court by failing to properly review whether the admission of hearsay testimony was harmless error.

3. Whether it was error for the Ninth Circuit not to defer to Guam interpretation of Guam laws.

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JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) to review by certiorari orders of the Ninth Circuit Court of Appeals herein which have adversely impacted upon important territorial questions in a manner conflicting with current case and statutory law. Pursuant to Rule 12.2 of the Rules of the Supreme Court, Petitioners seek review of four separate cases in a single petition because they all involve identical or closely related questions of law.

LAWS INVOLVED

The statutes, both of the United States and of Guam, which are to be interpreted by this Court are:

48 U.S.C. §1423(a) which states, in pertinent part:

§1423a. Scope of Legislative Authority: Bonding: Guam Power Authority Refinancing. The legislative power of Guam shall extend to all subjects of legislation of local application not inconsistent with the provisions of this chapter and the laws of the United States applicable to Guam. . . .

48 U.S.C. §1424 [Courts of Guam] states:

§1424. Courts of Guam; Jurisdiction; Procedure. (a) District Court of Guam; local courts. The judicial authority of Guam shall be vested in a court of record established by Congress, designated the "District Court of Guam", and such local court or courts as may have been or shall hereafter be established by the laws of Guam in conformity with section 1424-1 of this Title.

(b) Jurisdiction. The District Court of Guam shall have the jurisdiction of a district court of the United States, including, but not limited to, the diversity jurisdiction provided for in §1332 of title 28, United States Code, and that of a bankruptcy court of the United States.

(c) Original Local Jurisdiction. In addition to the jurisdiction described in subsection (b) of this section, the District Court of Guam shall have original jurisdiction in all other causes in Guam, jurisdiction over which is not then[1] vested by the legislature in another court or courts established by it. In causes brought in the district court solely on the basis of this subsection, the district court shall be considered a court established by the laws of Guam for the purpose of determining the requirements of indictment by grand jury or trial by jury.

48 U.S.C. §1424-1 [Local Courts] states

§1424-1. Local Courts; Appellate Court Authorized. (a) Composition; establishment of

local appellate court. The local courts of Guam shall consist of such trial court or courts as may have been or may hereafter be established by the laws of Guam. On or after the effective date of this Act [January 5, 1985], the legislature of Guam may in its discretion establish an appellate court.

(b) Local Court Jurisdiction. The legislature may vest in the local courts jurisdiction over all causes in Guam over which any court established by the Constitution and laws of the United States does not have exclusive jurisdiction. Such jurisdiction shall be subject to the exclusive or concurrent jurisdiction conferred on the District Court of Guam by section 1424(b) of this title.

(c) Local practice & procedure; local judges. The practice and procedure in the local courts and the qualifications and duties of the judges thereof shall be governed by the laws of Guam and the rules of those courts.

48 U.S.C. §1424-3 states:

§1424-3. Appeals Before Local Appellate Court is Created. (a) Appellate Jurisdiction of District Court. Prior to the establishment of the appellate court authorized by §1424-1(a) of this title, the District Court of Guam shall have such appellate jurisdiction over the local courts of Guam as the legislature may determine: Provided, That the legislature may not preclude the review of any judgment or order which involves the Constitution, treaties, or laws of the United States, including this chapter, or any authority exercised thereunder by an officer or agency of the Government of the United States, or the conformity of any law enacted by the legislature of Guam or of any orders or regulations issued or actions taken by the executive branch of the government of Guam with the Constitution, treaties, or laws of the United States, including this chapter, or

any authority exercised thereunder by an officer or agency of the United States.

(b) Appellate Division of the District Court; Judges; procedures; decisions. Appeals to the District Court of Guam shall be heard and determined by an appellate division of the court consisting of three judges, of whom two shall constitute a quorum. The district judge shall be the presiding judge of the appellate division and shall preside therein unless disqualified or otherwise unable to act. The other judges who are to sit in the appellate division at any session shall be designated by the presiding judge from among the judges who are serving on, or are assigned to the district court from time to time pursuant to §1424b of this title: Provided, That no more than one of them may be a judge of a court of record of Guam. The concurrence of two judges shall be necessary to any decision of the appellate division of the district court on the merits of an appeal, but the presiding judge alone may make any appropriate orders with respect to an appeal prior to the hearing and determination thereof on the merits and may dismiss an appeal for want of jurisdiction or failure to take or prosecute it in accordance with the applicable law or rules of procedure.

(c) U.S. Court of Appeals for the Ninth Circuit: jurisdiction; appeals; rules. The United States Court of Appeals for the Ninth Circuit shall have jurisdiction of appeals from all final decisions of the appellate division of the district court. The United States Court of Appeals for the Ninth Circuit shall have jurisdiction to promulgate rules necessary to carry out the provisions of this subsection.

(d) Appeals to local appellate court; effect on District Court. Upon the establishment of the appellate court provided for in §1424-1(a) of this title all appeals from the decisions of the local courts not previously taken must be taken to the appellate court. The establishment of

the appellate court shall not result in the loss of jurisdiction of the appellate division of the district court over any appeal then pending in it. The rulings of the appellate division of the district court on such appeals may be reviewed in the United States Court of Appeals for the Ninth Circuit and in the Supreme Court notwithstanding the establishment of the appellate court.

§1003 of Act of Oct. 5, 1984, (Pub.L. 98-454) 98 Stat. 1746, states:

> §1003. Criminal Appeals by local governments. The prosecution in a territory or Commonwealth is authorized -- unless precluded by local law -- to seek review or other suitable relief in the appropriate local or Federal appellate court, or where applicable, in the Supreme Court of the United States from:
>
> (a) a decision, judgment, or order of a trial court dismissing an indictment or information as to any one or more counts, except that no review shall lie where the constitutional prohibition against double jeopardy would further prosecution;
>
> (b) a decision or order of a trial court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the prosecution certifies to the trial court that the appeal is not taken for the purposes of delay and that the evidence is a substantial proof of a fact material in the proceeding; and
>
> (c) an adverse decision, judgment, or order of an appellate court.

8 Guam Code Annotated §90.19 (Appendix Q)

8 Guam Code Annotated §130.50 (Appendix R)

8 Guam Code Annotated §5.53 (Appendix S)

STATEMENT OF THE CASE

This Petition arises from the Ninth Circuit's reversal and remand to the Appellate Division of the District Court of Guam convictions in the cases of The People of the Territory of Guam v. Irvin Ibanez, (112F-86, D.C. No. CR-86-68-CCD, 880 F.2d 108 (9th Cir. 1989)), The People of the Territor of Guam v. Ramon Aldan Castro, (16F-87, D.C. No. 87-00033A), The People of the Territory of Guam v. Pedro V. Dalmal, (132F-87, D.C. No. 00008A) and The People of the Territory of Guam v. Norbert Botelho, (263F-86, D.C. No. CR-87-0005A).

Each the above cases was tried before a jury in the Superior Court of Guam. In each case the trial judge gave a reasonable doubt jury instruction which varied from the Guam statutory definition of reasonable doubt. See Appendices G-J) In reversing the decisions of the Appellate Division, the Ninth Circuit reiterated its newly

evoked doctrine of de novo review of Appellate Division cases and also expanded on an earlier Ninth Circuit opinion wherein reversible error was found for not giving the Guam statutory definition of reasonable doubt.

In the case of Ibanez, the Ninth Circuit gave as alternative grounds for reversal that the erroneous admission of hearsay testimony did not constitute harmless error.

The Ninth Circuit Court of Appeals has jurisdiction to review these cases under 48 U.S.C. §1424-3(c) and §1003 of Act of Oct. 5, 1984, (Pub.L. 98-454) 98 Stat. 1746, both of which in combination give the Ninth Circuit jurisdiction over appeals from the District Court of Guam

The District Court of Guam has jurisdiction to review these cases under 48 U.S.C. §1423-3(a), which give it appellate jurisdiction over the locally created courts of Guam.

The trial court, the Superior Court of Guam, has jurisdiction to try all territorial crimes pursuant to 48 U.S.C. §1424(c) and Guam Code of

Civil Procedure §82.

WHY THE WRIT SHOULD BE GRANTED

IT WAS ERROR TO REVERSE ON "REVERSIBLE ERROR" IN THE ABSENCE OF OBJECTION.

1. The "Scott Exception" violates Guam's laws

The Supreme Court has repeatedly acknowledged the authority of a state to bar consideration on appeal of an error that was not objected to at trial, and specifically as to jury instructions. See, e.g., Engle v. Issac, 456 U.S. 107,124-25, 102 S.Ct. 1558, 1570, 71 L.Ed.2d 783 (1982) (discussing Ohio's Rules of Criminal Procedure Rule 30 and noting that the provision properly barred litigating the validity of an unobjected to jury instruction on direct appeal). See also, Wainwright v. Sykes, 433 U.S. 72, 97 S. Ct. 2497, 53 L.Ed 2d 594 (1977). In Hankerson v. North Carolina, 423 U.S. 233, 97 S. Ct 2339, 53 L.Ed. 2d 306 (1977), the Court declared that:

> **The States, if they wish, may be able to insulate past convictions [from attack based on jury instructions that are constitutionally**

> invalidated subsequent to trial] by enforcing the normal and valid rule that failure to object is a waiver of any claim of error. See, e.g., Fed.Rule Crim.Proc. 30. (423 U.S. at 244, n.8, 97 S.Ct. at 2345-46, n. 8.)

Rule 30 is tempered in its application by Fed.Rule Crim.Proc. 52(b) (allowing an unobjected to allegation of error to be reviewed on appeal for plain error). See, United States v. Frady, 456 U.S. 152, 102 S.Ct 1584, 71 L.Ed 2d 816 (1982). Guam's statutes contain analogs to both of the above rules: 8 G.C.A. §90.19 provides that a party may NOT assign as error any portion of any instruction or omission therefrom unless he objects thereto, "stating distinctly the matter to which he objects and the grounds of his objection". And 8 G.C.A. §130.50(b) provides that "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court".

The most basic rule of statutory construction is that a statute is to be interpreted according to its plain meaning. 2A Sutherland, Statutory Construction, §45.02 (1984) Despite the clarity of Guam's

statutes, their likeness to federal statutes that are equally straightforward, and substantial case law from the United States Supreme Court allowing states to limit review of unobjected to jury instructions, the Ninth Circuit Court of Appeals reviewed the unobjected to jury instructions in the instant cases for reversible error. This was done despite case authority within the Ninth Circuit acknowledging the holding of Hankerson v. North Carolina. See Gibson v. Spalding, 665 F.2d 863, 864, n.1 (9th Cir., 1981). This standard was applied through an "exception" to Fed.R.Crim.P. 30 developed by the Ninth Circuit prior to the High Court's holding in Hankerson. See United States v. Scott, 425 F.2d 55, 57 (9th Cir. 1970) (en banc) (holding, in a criminal case brought under 21 U.S.C. §176a, that an objection may be raised for the first time on appeal and be reviewed for "reversible", rather than "plain", error if objection at trial would have been made futile by a "solid wall of circuit authority").

The "Scott" exception, as it has come to be known, was never applied by the Superior Court of Guam or by the Appellate Division of the District Court of Guam. However, it was made the linchpin of the major Ninth Circuit opinion which now stands to reverse at least nine of the most serious felony cases the territory of Guam has generated over the last four years. (All in situations where there was no objection at trial and no plain error found on appeal.) Guam v. Yang, 850 F.2d 507 (9th Cir. 1988) (en banc), (rev'g panel decision at 800.F.2d 945 (1986)) (hereinafter Yang II).

In Yang II the Ninth Circuit indicated that the application of the Scott exception was being narrowly applied to the "unique" fact pattern which that case presented. Id at 512, n. 8. There, the Yang II court focused on the fact that both the defense and government counsel had requested Guam's statutory definition of "reasonable doubt" for instruction to the jury. The trial court, instead of reading this "moral certainty"

definition, (8 GCA §90.23) provided the jurors with an instruction based on the "hesitation to act" definition used in the federal courts.

The Court of Appeals also noted, in reversing the panel decision, that at the time Yang's case went to the jury the courts of Guam were improperly relying on unpublished Ninth Circuit decisions (which had found the nonconforming instruction to not warrant reversal in previous cases) as binding precedent. For these reasons the Ninth Circuit found that a solid wall of circuit authority had made objection futile and applied the Scott exception so that the case could be remanded on a finding of reversible error. Id.

In all of the cases which are the subject of this petition, the Ninth Circuit has drastically expanded the scope of what may have once been a narrow exception, and in the process has done violence to Guam's statutory requirement of contemporaneous objection to jury instructions, and undone a large segment of the serious felony convictions generated in Guam. In none of these

cases did either attorney show any interest in having the jury instructed according to Guam's statutory definition of reasonable doubt.

In the instant line of cases, the Ninth Circuit has expanded the notion of "a solid wall of circuit authority" to include a picket fence with an open gate. At the time each of the petitioned cases went to the jury, the decision of the three judge Ninth Circuit panel in Guam v. Yang, 800 F.2d 945 (9th Cir. 1986) (hereinafter Yang I) was published and on the shelf. That opinion, though later withdrawn (see, 833 F.2d at 1379) and ultimately overruled concluded as follows:

> The trial court's earlier instruction on the nature of reasonable doubt was a permissible formulation of the government's burden of proof, at least in the absence of objections. * * * Thus the District Court did not err in finding that the trial court's instructions did not constitute plain error. (Id. at 948) (Emphasis added)

In the wake of this published opinion one can hardly imagine a court finding that a solid wall of circuit authority precluded objection. The one published opinion in the area specifically invited

objection. And the majority opinion was accompanied by a vigorous dissent which clamored for it. (See, Dissenting Opinion, Ferguson, J., 800 F.2d 948). It is simply unreasonable to find that objection was rendered futile by the then prevailing circuit authority. In Dec. 1987, the Ninth Circuit panel decision in Yang I was withdrawn (833 F.2d 1379), and a petition for rehearing was granted. After this point, that "solid wall" simply did not exist.

Despite Guam's vehement opposition to the Ninth Circuit's application of the Scott exception to these cases, that court expanded the exception to apply to the present cases.

2. The "Scott Exception" violates the case authority of this Court.

The Scott exception is contrary to the case law of the Supreme Court and the Federal Judicial system. See United States v. Lopez, 373 U.S. 427, 436, 83 S. Ct. 1381, 1386, (1963) (holding that in the absence of objection to a jury instruction, the charge is reviewed for plain

error, affecting substantial rights). In Hankerson v. North Carolina, supra, the Supreme Court cited Fed.R.Crim.P. 30 as an example of a rule that would bar consideration of post-trial allegations of error as to jury instructions that were decidedly valid at the time they were given to the jury, but subsequently found unconstitutional. 423 U.S. at 244, n.8, 97 S.Ct. at 2345-46, n.8. The court has repeatedly interpreted state analogs to Rule 30 as validly blocking consideration on direct appeal of objections, first raised after trial, to instructions that were invalidated subsequent to the trial. See, e.g., Engle v. Issac, 456 U.S. 107,124-25, 102 S.Ct. 1558, 1570, 71 L.Ed.2d 783 (1982) (discussing Ohio's Rules of Criminal Procedure Rule 30, in the context of a habeas corpus petition and noting that the provision properly barred litigating the validity of an unobjected to jury instruction on direct appeal).

The Scott exception is in undeniable conflict with controlling federal law. The Ninth Circuit's approach in Scott is that where a change in the

law would make the previously valid instruction erroneous, the defendant is able to take a fresh shot at it on appeal, though he has not previously objected, not shown plain error, not met any burden of showing why he failed to object, and has not shown he suffered any actual prejudice. While that approach has some value, the federal court system (under the direction of significant Supreme Court decisions) has found other ways to support its benefits without providing unnecessary opportunities for litigation and delay.

The Supreme Court has made it clear that though unobjected to instructions may be limited to a plain error review on direct appeal (which in itself accords some relief), the federal courts will entertain habeas corpus petitions under such circumstances, applying a "cause and actual prejudice" standard of review. See, Henderson v. Kibbe, 431 U.S. 145, 97 S. Ct. 1730, 52 L.Ed.2d 203 (1977), Engle v. Issac, supra, Reed v. Ross, 466 U.S. 1, 104 S. Ct. 2901, 82 L.Ed.2d 1 (1984) and Murray v. Carrier, 477 U.S. 478, 106 S. Ct.

2639, 91 L.Ed.2d 397 (1986). This standard requires the defendant to actually show excuse for his failure to object (which has been held to include situations where the law at the time of trial has since changed, Reed v. Ross, 466 U.S. at 18, 104 S.Ct. at 2911) and that he has suffered an actual harm from the newly alleged error.

The rationale for enforcing Rule 30-type bars to review of unobjected to appeals of error is obvious. The cost of allowing review of them is high. This Court, in discussing the affect of habeas petitions on the meaning and finality of a conviction in Engle v. Issac, supra at 102 S.Ct. 1572, stated, "Passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible. While a habeas writ may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution." The same considerations apply to a protracted direct appeal. More specific to these circumstances are the considerations that the government was prevented

from correcting the error at trial, because no objection was raised. See Gibson v. Spalding, supra. As the Supreme Court specifically acknowledged in Hankerson, supra, in the absence of such enforcement a jurisdiction might face, as Guam now does, a situation where a change in procedural law would otherwise necessitate the retrial of a large block of cases despite no doubt being cast on the guilt of any defendant.

It is clear that Guam, as a territory, should be permitted to bar review of unobjected to jury instructions in the absence of plain error. The Organic Act of Guam gives the Guam Legislature the power to establish the "practice and procedure" in the local courts. 48 U.S.C. §1424-1(c). The law of Guam dictates that result. See, 8 G.C.A. §§90.19 and 130.50(b). (Appendices Q, R)

The same policies that support the resolution of all objections at trial in a state court pertain with equal strength to the territory of Guam. (In fact, due to Guam's relative isolation from the rest of the United States, the fact that many co-defendant

witnesses come to be incarcerated in federal prisons on the mainland, and the transient character of a large segment of Guam's population, Guam has a greater interest in the finality of a criminal conviction than most states. Retrials here are extraordinarily costly and difficult.)

The Supreme Court has noted that territories (and even the District of Columbia) are entitled to operate their criminal justice systems without interference except when necessary. See, Fisher v. United States, 328 U.S. 463, 467, 66 S.Ct. 1318, 1324, 90 L.Ed 2d 1382 (1946): "Matters relating to law enforcement in the District [of Columbia] are entrusted to the courts of the District. Our policy is not to interfere with the local rules of law which they fashion, save in exceptional circumstances where egregious error has been committed."

In the instant cases the rule that the Ninth Circuit seeks to force upon Guam, the so called "Scott" exception, is clearly at odds with the law of the land and with the opinions of the Supreme

Court. It is ironic that the Ninth Circuit is seeking to force Guam to modify its own laws, where these laws were intended to conform with the rest of the United States.

IT WAS ERROR FOR THE NINTH CIRCUIT TO ALTERNATIVELY REVERSE IBANEZ WITHOUT A FULL "DE NOVO" REVIEW OF THE CASE

In the case of People of the Territory of Guam v. Irvin Ibanez, herein, the Ninth Circuit reversed and remanded on alternative holdings. The primary focus of the decision was the jury instruction regarding reasonable doubt. The panel also indicated by way of a footnote that even if it were not to reverse on that basis it would have reversed on the grounds that hearsay was erroneously admitted over the defendant's objection. (n. 5) The Court of Appeals, in its discussion of that holding, discounts the conclusion of "harmless error" reached by the District Court. The Court of Appeals applied Gaines v. Thieret, 846 F.2d 402, 406-07 (7th Cir. 1988) to support its conclusion that because the portion of

properly admitted evidence which the District Court relied on was not inherently trustworthy, the improperly admitted evidence could not be harmless. Id.

Guam law requires that a reviewing court consider the effect of alleged errors and dismiss those assertions that are without substantial consequence. 8 G.C.A. §130.50(a) reads that, "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." (Emphasis added) Under Guam law, as elsewhere, the word "shall" is mandatory, as compared to "may" which is permissive. See 8 GCA §5.23, Appendix S) 8 G.C.A. §130.50(a) is essentially a mirror image of Fed. R. Crim. P. 52(a) and the same considerations apply.

In Ibanez, the territory of Guam also seeks certiorari as to whether the analysis by the court below is proper in light of this Court's opinion in Delaware v. Van Arsdall, 475 U.S. 673, 680, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674 (1986). Of the lower courts' actions, this Court stated:

> After concluding that the trial judge's ruling was constitutional error, the Delaware Supreme Court rebuffed the state's efforts to show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' [Citations omitted] In so doing, it offered no explanation why the Chapman harmless error standard, which we have applied in other Confrontation Clause cases, [citations omitted], is inapplicable here. We find respondent's efforts to defend the automatic reversal rule unconvincing.
> at 106 S.Ct. p. 1436.

In Yang II, supra, the Ninth Circuit, for the first time, determined to review Guam's interpretation of Guam law de novo. It was error for the Ninth Circuit, while claiming de novo review, to fail to afford such review in the cases subject to this petition. See, People v. Ibanez, n.4.

In Delaware v. Van Arsdall, supra, the Supreme Court determined that there was a "host of factors" that determine whether the development of testimony in violation of the Confrontation Clause is nevertheless harmless, including: the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of testimony corroborating or contradicting the testimony of the

defendant on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." 475 U.S. at 684, 106 S. Ct. at 1437.

The Ninth Circuit, in Ibanez, failed to examine the whole record of the case, relying only upon the two witnesses discussed by the Appellate Division. See Ibanez, n.5. This failure violates the Ninth Circuit's own concept of "de novo" review described in Campbell v. U.S. Dist. Ct. for the N.Dist. of California, 501 F.2d 196, 206 (9th Cir. 1974) where it held that a lower court, in holding a "de novo" review, must at least read all of the questioned evidence before making its finding. Other evidence provided by the government, and the degree of cross-examination of the questioned witnesses was not discussed. The Ninth Circuit, noting simply that because one of these witnesses was an accomplice and the other a prison mate of the defendant's, determined that their credibility was dubious and therefor the admitted hearsay was not harmless. Ibanez at n. 5. Their analysis did

not take into account that both of these significant witnesses had been subjected to lengthy cross-examination (which would have allowed the jury significant opportunity to observe their demeanor) and that these witnesses had substantial corroboration (independent of the hearsay) from a number of trustworthy witnesses. Nor were other Van Arsdall factors applied.

The First Circuit, following Campbell, has said: "De novo determination" can apply only to fact-related matters; a court, at any level, can determine the state of the law.." Gioiosa v. U.S., 684 F.2d 176, 179 (1982).

Using these standards, it is clear that the Ninth Circuit did not give full de novo review to the issue of "harmless error".

IT IS ERROR FOR THE NINTH CIRCUIT NOT TO DEFER TO GUAM INTERPRETATION OF GUAM LAWS

In the alternative, the application of Yang II, through the cases contained in this petition and at least five other cases not ripe for review by this

Court threaten the ability of Guam to develop its own court system. (See Appendices L-P) Indeed, prior to Yang II, it was clearly the law of the circuit that deference was to be given to local determinations of local law. In Schenck v. Government of Guam, 609 F.2d 387, 390 (9th Cir. 1979) the rule was stated as:

> In reviewing a decision of a territorial court, we are required to give a high degree of deference of its determination of local law. Specifically, we may not overturn the decision of the District Court of Guam on a matter of local law, custom or policy, if the decision is based upon a tenable theory and is not inescapably wrong or manifest error. [Citing cases going back to the 1940 decision of this Court, Bonet v. Texas Co., 308 U.S. 468, 470, 60 S.Ct. 349, 84 L.Ed. 401 (1940)] If the decision is based on a tenable theory, we may not reverse even if we disagree with the ruling or believe that the territorial court's conclusion is the least desirable of several possible alternatives. Capital Ins. and Surety Co. 882 F.2d at 626, DeCastro, 322 U.S. at 459, 64 S.Ct. 1121, Bonet, 308 U.S. at 471, 60 S.Ct. 349.

Since that time, this rule was upheld in Ball v. Tokyu Land Corp., 724 F.2d 1403 (9th Cir. 1984); Laguana v. Guam Visitors Bureau, 725 F.2d 519 (9th Cir. 1984); People v. Fejeran, 687 F.2d 302 (9th Cir. 1982); ECM Co. Inc. v. Maeda Pacific

Corp., 764 F.2d 619 (9th Cir. 1985) and, of course Yang I.

The Organic Act (48 U.S.C. §1424) provides that the "judicial authority" of Guam lies in the District Court of Guam, and other local courts. This includes the Appellate Division. Thus, Congress has determined that the District Court, composed as prescribed by Congress, is a Guam court. Nowhere does Congress state that the Ninth Circuit possesses "judicial autority of Guam" or is the "highest court" of Guam, although it does have the jurisdiction to hear all appeals from the District Court of Guam (48 U.S.C. §1424-3(c)).

With the expanded Scott exception, from which the People are petitioning this Court, the Ninth Circuit is not only destroying precedents begun by this Court with respect to territories, but is emasculating the Guam Legislature's ability to prescribe the "practice and procedures" in courts established by it. 48 U.S.C. §1424-1(c), and is distorting the Congress' concept of what are "local courts" of Guam.

In Territory of Guam v. Olsen, 431 U.S. 195, 97 S.Ct. 1774, 1780, 52 L.Ed.2d 250 (1977), the four dissenting justices, through Mr. Justice Marshall, stated:

> The result of the Court's decision is perhaps unprecedented in our history. The Court today abolishes the Supreme Court of Guam, a significant part of the system of self-government established by some 85,000 American citizens through their freely elected legislatures.

The issue not is not a Supreme Court of Guam (that has since been authorized by Congress - 48 U.S.C §1424-1 to 1424-4), but is whether Guam's laws and courts can develop within the the context of Guam and, absent constitutional error, be respected by the Article III courts of the United States.

CONCLUSION

This Court should accept the Territory's Petition for Certiorari and reverse and remand the decisions of the Ninth Circuit Court of Appeals on the grounds stated in this Petition. The cases before this Court are worthy of review inasmuch as the issues involve a split in circuit authority,

and the authority of the Guam Legislature to prescribe its own rules of practice and procedure in the Guam courts.

Dated this 12th day of April, 1990.

ELIZABETH BARRETT-ANDERSON
Attorney General

By: Charles H. Troutman III
CHARLES H. TROUTMAN III
Compiler of Laws

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE PEOPLE OF THE TERRITORY OF GUAM,	)	No. 88-1412
Plaintiff-Appellee,	)	DCA No. 86-00068A SC CR. No. 112F-86
v.	)	
IRVIN IBANEZ,	)	ORDER
Defendant-Appellant.	)	

Before: BROWING, HALL and LEAVY, Circuit Judges.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed. R. App. P. 35.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Appendix B

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE PEOPLE OF THE TERRITORY OF GUAM,	)	No. 88-1462 D.C. No. Cr-87-00033A
Plaintiff-Appellee,	)	
v.	)	ORDER
RAMON CASTRO,	)	
Defendant-Appellant.	)	

Appeal from the United States District Court for the District of Guam
Duenas, Laureta, and King, District Judges, Presiding

Argued June 30, 1989
Submission Deferred June 30, 1989
San Francisco, California

Filed August 11, 1989

Before: Tang, Reinhardt, and Wiggins, Circuit Judges

The nonstatutory reasonable doubt instruction used in this case constitutes reversible error. Guam v. Ibanez, No. 88-1462 (9th Cir. July 11, 1989). We reverse and remand for a new trial.

REVERSED AND REMANDED

Appendix C

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE PEOPLE OF THE TERRITORY OF GUAM,	)	No. 88-1462
	)	D.C. No. Cr-87-00033A
Plaintiff-Appellee,	)	
v.	)	ORDER
RAMON CASTRO,	)	
Defendant-Appellant.	)	

Appeal from the United States District Court for the District of Guam
Duenas, Laureta, and King, District Judges, Presiding

Before: Tang, Reinhardt, and Wiggins, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b). The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Appendix D

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE PEOPLE OF THE TERRITORY OF GUAM,	)	No. 88-1467
	)	D.C. No. Cr-88-00008A
Plaintiff-Appellee,	)	
v.	)	ORDER
PEDRO V. DALMAL	)	
Defendant-Appellant.	)	

Appeal from the United States District Court for the District of Guam
Duenas, Laureta, and King, District Judges, Presiding

Submitted June 30, 1989*
San Francisco, California
Filed August 11, 1989
Before: Tang, Reinhardt, and Wiggins, Circuit Judges

The nonstatutory reasonable doubt instruction used in this case constitutes reversible error. Guam v. Ibanez, No. 88-1412 (9th Cir. July 11, 1989). We reverse and remand for a new trial.

REVERSED AND REMANDED

*The panel finds this case appropriate for submission without argument pursuant to Ninth Cir. R. 34-4 and Fed. R. App. 34(a).

Appendix E

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE PEOPLE OF THE TERRITORY OF GUAM,	)	No. 88-1467 D.C. No. Cr-88-00008A
Plaintiff-Appellee,	)	
v.	)	ORDER
PEDRO V. DALMAL	)	
Defendant-Appellant.	)	

Appeal from the United States District Court for the District of Guam
Duenas, Laureta, and King,
District Judges, Presiding

Before: Tang, Reinhardt, and Wiggins,
Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b). The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Appendix F

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE PEOPLE OF THE TERRITORY OF GUAM,	)	No. 88-1246 D.C. No. Cr-87-00005A
Plaintiff-Appellee,	)	
v.	)	MEMORANDUM*
NORBERT BOTELHO,	)	
Defendant-Appellant.	)	

Appeal from the United States District Court for the District of Guam, Appellate Division
TASHIMA, LAREUTA, DUENAS, District Judges Presiding

Submitted May 8, 1989**
San Francisco, California
Before: WALLACE and NOONAN, Circuit Judges, and BURNS***, District Judge

*This disposition is not appropriate for publication and may not be cited to or by the courts of this Circuit except as pro-vided by 9th Circuit R. 36-3

**The panel unanimously finds this case suitable for decision without oral argu-ment. Fed. R. App. R. 34(a) and 9th Cir. R. 34-4

***Honorable James M. Burns, District Judge for the District of Oregon, sitting by designation.

Botelho was convicted by a jury in the Superior Court of Guam on felony charges of criminal sexual conduct, robbery, and possession and use of a deadly weapon in the commission of a felony. The trial court denied Botelho's motion, made on the day set for trial, for substitution of appointed counsel. The trial court denied his motion to discover mental health records of the government's chief witness and restricted cross examination to preclude inquiry into that witness' history of psychiatric treatment and confinement. In the instructions to the jury, the trial court defined "reasonable doubt" by an instruction that differed from Guam's statutory definition. Botelho contends that one or more of these rulings requires reversal of his conviction. The Appellate Division of the District Court affirmed the conviction. This court has jurisdiction of appeals from the Appellate Division under 48 U.S.C. §1424-3(c).

In People of the Territory of Guam v. Yang, 850 F.2d 507, 514 (9th Cir. 1988), the court ruled

en banc that the trial court should have relied upon Guam's statutory definition of "reasonable doubt." In accordance with Yang, together with the recent case of People of the Territory of Guam v. Ibanez, 880 F.2d 108 (9th Cir. 1989), we reverse Botelho's conviction.

Of the two remaining assignments of error, it is not necessary to address the denial of Botelho's motion for substitution of appointed counsel. We discuss briefly the denial of Botelho's discovery motion and the restriction of his cross examination for the assistance of the trial court on remand.

No case has been cited to us holding that a third party is entitled as a matter of right to have the mental health records of another produced in connection with a public trial. We have found no such authority either.

The trial court's restriction of Botelho's cross examination was also proper. When cross examination relates to impeachment evidence, the test is whether the defendant was precluded from putting before the jury sufficient information to

show the biases and motivations of the witness. Chipman v. Mercer, 628 F.2d 528, 530 (9th Cir. 1980); United States v. Bleckner, 601 F.2d 382, 385 (9th Cir. 1979). The record shows clearly that Botelho's cross examination was intended to show that the witness had a history of sexual deviance. The sexual history of a witness does not ordinarily reflect on his biases, motivations, or credibility. The ruling promoted the fair and expeditious conduct of the trial by avoiding the introduction of an extraneous, emotionally charged issue that could easily have distracted the jury or the pro se defendant from the true issues of the case. Accordingly, the restriction of Botelho's cross examination was well within the trial court's discretion.

Based on the foregoing, the decision of the Appellate Division is REVERSED and the case is REMANDED for a new trial.

Appendix G

IBANEZ

The trial court provided the following definition, to which defendant did not object:

> The test is one of reasonable doubt. Reasonable doubt is a doubt that's based upon commonsense and reason. And it's the kind of doubt that makes a reasonable person sort of hesitate to do a certain act. Therefore, proof beyond a reasonable doubt is proof of such a convincing character that would make a reasonable person without hesitation rely and act upon it in the most important of his or her own affairs.

The Guam Legislature has proposed a different definition, which reads:

> Reasonable doubt...is not a mere possible doubt because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the mind of the trier of fact in that condition that he cannot say he feels an abiding conviction to a moral certainty, of the truth of the charge.

8 Guam Code Ann. §90.23 (1985).

(880 F.2d 108, 110-11 (9th Cir. 1989).)

CASTRO

The jury instruction given by the trial court here is virtually identical to that given in Yang:

> Now, it is not required that the Government prove the guilt of a defendant beyond all possible doubt. The test, that is one of reasonable doubt.
>
> Reasonable doubt is a doubt that is based upon common sense and reason, and it's the kind of doubt that would make a reasonable person hesitate to do a certain act.
>
> Therefore, proof beyond a reasonable doubt is proof of such a convincing character that would make a reasonable person, without hesitation, rely and act upon it in the most important of his or her own affairs. (TR Vol. IV, p.87).

This definition is based on E. Devitt & C. Blackmar, Federal Jury Practice and Instructions.

The Guam Legislature elected the "moral certainty" approach in defining reasonable doubt. Guam Code Annotated §90.23(a) provided:

> It is not a mere possible doubt because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and

consideration of all the evidence, leaves the mind of the trier of fact in that condition that he cannot say he feels an abiding conviction to a moral certainty, of the truth of the charge.

(Opinion of the District Court, Appellate Division (D.C. No. 87-00033A) at pp. 2-3.)

DALMAL

The jury instruction given by the trial court here is virtually identical to that given in Yang.

> Now let me tell you what reasonable doubt is. Reasonable doubt is a doubt that is based upon common sense and reason. And it's the kind of doubt that would make a reasonable person hesitate to do a certain act.
>
> Therefore, proof beyond a reasonable doubt is proof of such a convincing character that would make a reasonable person, without hesitation, rely and act upon it in the most important of his or her own affairs.

This definition is based on E. Devitt & C. Blackmar, Federal Jury Practice and Instructions.

The Guam Legislature elected the "moral certainty" approach in defining reasonable doubt. Guam Code Annotated §90.23(a) provided:

> It is not a mere possible doubt because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the mind of the trier of fact in that condition that he cannot say he feels an abiding conviction to a moral certainty, of the truth of the charge.

(Opinion of the District Court, Appellate Division (D.C. No. 87-00033A) at pp. 2-3.)

BOTELHO

Botelho argues that the jury instruction defining reasonable doubt, which deviates from Guam's statute defining reasonable doubt, constitutes plain error.

The Guam Legislature defines reasonable doubt as follows:

> It is not a mere possible doubt because everything relating to human affairs, and depending on moral evidence, is open to some possible for imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the mind of the trier of fact in that condition that he cannot say he feels an abiding conviction to a moral certainty, of the truth of the charge. 8 G.C.A. §90.23(a).

The following reasonable doubt jury instruction was given:

> Reasonable doubt is a doubt that is based upon common sense and reason. It is the kind of doubt that would make a reasonable person sort of hesitate to do a certain act. Therefore, proof beyond a reasonable doubt is proof of such a convincing character that would make a reasonable

person unhesitatingly, without hesitation, rely and act upon it in the most important of his or her own affairs.

(Opinion of the District Court of Guam, Appellate Division (D.C. No. 87-00005A) at p.8.)

Appendix K

The People of the Territory of Guam,
Plaintiff-Appellee,

v.

Ivan Ibanez, Defendant-Appellant,

No. 88-1412.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted May 11, 1989.

Decided by Memorandum July 5, 1989.

Order and Opinion July 19, 1989.

Before BROWING, HALL and LEAVY, Circuit Judges.

CYNTHIA HOLCOMB HALL, Circuit Judge:

Defendant Irvin Ibanez was convicted of committing a brutal murder. He stabbed the victim, Scott Pierce, 40 times and then decapitated him. For this heinous offense, defendant was sentenced to life imprisonment without the possibility of parole, probation, or work release. We are constrained by en banc decision of this circuit to reverse the conviction.

I

On March 8, 1986, defendant Ibanez ("defendant"), his brother Christopher Ibanez ("Christopher"), Peter Cruz ("Cruz"), and Scott Pierce ("Pierce"), Peter Cruz ("Cruz"), and Scott Pierce ("Pierce") got together for the evening. They began drinking alcohol. Later that evening, the men engaged in horseplay, which consisted of playful punching and name calling. This horseplay turned serious when Pierce punched Christopher with too much force, and Christopher responded in kind. Defendant, intervened, and a verbal exchange between him and Pierce ensued. The four men then entered defendant's jeep and set out to the place where Christopher and Pierce had parked their cars.

Upon arrival, defendant and his brother Christopher told Pierce to leave the group. When Pierce refused, Christopher began pushing him towards his car. Christopher then struck Pierce, who still refused to leave. At this point, defendant joined the altercation by grabbing

Pierce, putting him into a headlock, and slamming his head repeatedly against the jeeps push bar. Defendant then dragged Pierce toward Pierce's car and shove him in the back seat. Pierce pleaded to be let go, but defendant responded that it was too late.

Defendant drove Pierce to another part of town, stopping only to punch Pierce. Upon arrival, defendant jumped into the back seat and resumed beating Pierce. During the beating, defendant ordered his brother Christopher to get him a knife. Cruz retrieved a knife from the glove compartment and handed it to defendant's brother, who gave it to defendant. Defendant grabbed the knife and began stabbing Pierce. When the stabbing ceased, defendant had managed to puncture Pierce 40 times, killing him.

Christopher and Cruz departed at some point during the slaying. Defendant then cut off Pierce's head. He left the body in the car in one part of town, and buried the head in another part.

Defendant and his brother were charged with aggravated murder, kidnapping, and possession and use of a deadly weapon in the commission of a felony. As his defense, defendant denied culpability. This defense was unsuccessful, and the jury convicted him on all counts.

Defendant appealed the conviction to the Appellate Division of the District of Court of Guam. The Appellate Division affirmed. Defendant now seeks review from this court. We have jurisdiction over this timely appeal under 48 U.S.C. §1424-3 (Supp. IV 1986).[1]

---

1 In this appeal, defendant raises an issue concerning the propriety of the trial court's "beyond a reasonable doubt" instruction. The government makes a confusing argument that we are without jurisdiction to rule on this issue because the Appellate Division has not had an opportunity to address it. As we make our way through the confusion, actually two points are made.
First, the government contends that we are bound by the Supreme Court's principle that it has no certiorari jurisdiction over decisions from state courts where the federal question at issue has not been "pressed nor passed upon" in state court. Illinois v. Gates, 462 U.S. 213, 218-19, 103 S.Ct. 2317, 2321-22, 76 L.Ed.2d 527 (1982). According to the

government, we must follow this principle because of our declaration in Guam v. Yang, 850 F.2d 507, 510 n. 4 (9th Cir. 1988) (en banc) ("Yang II"), that "[u]til Guam establishes its own appellate court, this court shall serve as Guam's 'Supreme Court,' hearing appeals from the Appellate Division." This argument is meritless. Initially, the government incorrectly states the holding in Gates. The Court explicitly declined to decide whether this principle is jurisdictional or prudential. Gates, 462 U.S. at 222, 103 S.Ct. at 2323-24. Moreover, the en banc panel in Yang II declared the Ninth Circuit Guam's Supreme Court, not the Supreme Court of the United States. In any event, we may exercise our discretion and review an issue not raised below, even if the Appellate Division expressly declined to do so. Cf. In re Marvin Properties, Inc., 854 F.2d 1183, 1187 (9th Cir. 1988) ("fact that the [Bankruptcy Appellate Panel] acted within its discretion in refusing to reach [an issue not raised before the bankruptcy court] does not resolve the question whether we should address it").

Second, the government argues that we lack jurisdiction because the Appellate Division did not consider this issue, and thus there is no "final decision." The government's citation to Guam v. Manibusan 729 F.2d 1236 (9th Cir. 1984), for this conclusion is misplaced. There we concluded that the Appellate Division's remand for further proceedings deprived this court of jurisdiction, at least without the presence of an exception to the final judgment rule. See Id. at 1238; see also Kiaaina v. Jackson, 851 F.2d 287, 289 (9th Cir. 1988) (no final judgment generally

where further proceedings contemplated). Obviously, no further proceedings contemplated). Obviously, no further proceedings in the trial court were contemplated in this case.

II

On appeal, defendant contends that his conviction must be overturned because the trial court erroneously defined "beyond a reasonable doubt." The trial court provided the following definition, to which defendant did not object:

> The test is one of reasonable doubt. Reasonable doubt is a doubt that's based upon commonsense and reason. And it's the kind of doubt that makes a reasonable person sort of hesitate to do a certain act. Therefore, proof beyond a reasonable doubt is proof of such a convincing character that would make a reasonable person without hesitation rely and act upon it in the most important of his or her own affairs.

The Guam Legislature has proposed a different definition, which reads:

> Reasonable doubt... is not a mere possible doubt because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the mind of the trier of fact in that condition that he cannot say he feels an abiding conviction to a moral certainty, of the the truth of the charge.

In Guam v. Yang, 850 F.2d 507 (9th Cir. 1988) (en banc) ("Yang II"), a unanimous en banc

panel addressed the same disparity in definitions presented in this case. While recognizing the permissive nature of Guam's statutory definition, the court nevertheless concluded that the trial court's definition was erroneous under Guam law. Id. at 513-14. The en banc panel concluded that this error required reversal. Id. Yang II was decided on June 20, 1988, well after defendant's trial and after the briefing was completed for the Appellate Division.[2]

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2 The settled rule in this circuit is that issues not raised before the trial court will not be reviewed for the first time on appeal. United States v. Whiteen, 706 F.2d 1000, 1012 (9th Cir. 1983), cert. denied, 465 U.S. 1100, 104 S.Ct. 1593, 80 L.Ed.2d 125 (1984); Guam v. Okada, 694 F.2d 565, 570 n. 8 (9th Cir. 1982), modified, 715 F.2d 1347 (1983), cert. denied, 469 U.S. 1021, 105 S.Ct. 441, 83 L.Ed.2d 367 (1984). However, this rule, which is merely one of practice, is subject to certain exceptions. Okada, 694 F.2d at 570 n. 8. The issue on appeal in this case falls within at least two of these exceptions. First, the issue presented is purely a matter of law. Second the issue arose in response to an en banc opinion of this circuit that postdated defendant's trial. See text accompanying this footnote.

The Government of Guam insists that Yang II does not control the disposition of this case. The government's argument centers around the review the court applied to the case. The court in Yang II concluded that its review of the instruction should be reversible error, not for plaint error, despite defendant's failure to lodge a contemporaneous objection before the trial court. In arriving at this conclusion, the en banc panel invoked the so-called Scott exception to the general rule that objected-to instructions are reviewed for plain error. See United States v. Scott, 425 F.2d 55 (9th Cir. 1970) (en banc). In Scott, the Ninth Circuit adopted the principle that contemporaneous object is not required when it would be futile because "a solid wall of circuit authority" forecloses the trail court from ruling otherwise. Id. at 57-58, quoted in Yang II, 850 F.2d at 512 n. 8. In holding that the case fit within the Scott exception, the Yang II court reasoned:

> We believe that the Scott exception applies to the unique facts of this case. Both the government and the defense had requested an instruction in accordance with the reasonable doubt instruction contained in section 90.23(a). The trial court, however, decided to give the nonstatutory reasonable doubt instruction based on Guam v. Ignacio, Cr.App. No. 79-00036A (D.Guam App.Div.) aff'd, 673 F.2d 1339 (9th Cir. 1982). In Ignacio, which we affirmed prior to Yang's trial, we approved the same nonstatutory reasonable doubt instruction that the trial court gave in this case. In light of our decision in Ignacio, the fact that Yang's trial was before the same judge who heard Ignacio, and Guam's erroneous practice of relying on our unpublished decisions as binding precedent, we conclude that, as in Scott, an objection would have been futile because the trial court would not have changed its decision.

Yang II, 850 F.2d at 512 n. 8.

The government attempts to distinguish Yang II. First, the government points out that, unlike in Yang II, defendant made no request for the statutory instruction. However, the Yang II court did not conclude that a request was tantamount to an objection; it thus resorted to the Scott exception. Indeed, a fair reading of Yang II indicates that the court did not attach much

significance to the fact that a request was made; instead, the court appeared to note this by way of background to the futility discussion. After noting this fact, the court summarized the reason for applying the Scott exception, which we repeat:

> In light of our decision in Ignacio, the fact that Yang's trial was before the same judge who heard Ignacio, and Guam's erroneous practice of relying on our unpublished decisions as binding precedent, we conclude that, as in Scott, an objection would have been futile because the trial judge would not have changed its decision.

Id. In the end, in both Yang II and in this case, defendants failed to object to the instruction before the trial court.

Second, the government urges us to distinguish Yang II based on a phrase employed in the majority opinion[3] of the three-judge panel that

---

3 Judge Ferguson filed a dissent in Yang I. The government claims that this dissent should have alerted defendant to the propriety of a contemporaneous objection urging the statutory instruction. We fail to see how this factor distinguishes Yang II. The majority opinion, despite the dissent,

still stated the law at the time of defendant's trial. The trial court of Guam, if asked to rule on an objection to the instruction, would have been bound by the majority's decision. In addition, Yang II emphasized that, in large measure, Guam's erroneous practice of relying on the Ninth Circuit's unpublished dispositions would have made a contemporaneous objection by Yang futile. Yang II, 850 F.2d at 512 n. 8. For in the unpublished decision in Ignacio, a majority approved the same nonstatutory instruction that was given in Yang II. Significantly, Judge Ferguson also filed a dissent in Ignacio, arguing that the nonstatutory instruction provided violated Guam law. This fact did not dissuade the Yang II court from applying the Scott exception.

originally decided that case. See Guam v. Yang, 800 F.2d 945 (9th Cir. 1986) ("Yang I"). Yang I, which was decided prior to defendant's trial, reviewed the same nonstatutory instruction given in this case, by the same judge as in this case, and held that "[t]he trial court's earlier instruction on the nature of reasonable doubt was a permissible formulation of the government's burden of proof, at least in the absence of objections." Id. at 948. The government seizes on the language "at least in the absence of objections," arguing that this required defendant to voice a contemporaneous objection. However, the thrust of Yang I clearly is that under Guam law the nonstatutory instruction was proper. We are unpersuaded that the insertion of this phrase into the conclusion of Yang I served to dismantle the "solid wall of authority" the unanimous en banc panel in Yang II found to exist prior to the Yang I decision.

In sum, we find that the facts of this case cannot be distinguished meaningfully from the facts

in Yang II. As in Yang II, the same trial judge that hear Ignacio presided over defendant's case. And as in Yang II, Guam maintained the practice of relying on our unpublished decisions as binding precedent. Finally, contrary to the government's position, we conclude that Yang I could only add to the trial judge's confidence that his non-statutory formulation was proper. Consequently, we hold that Yang II controls this case and that our review is thus for reversible error.[4] The Yang II decision found the nonstatutory instruction to warrant reversal. We must reach the same conclusion.

---

4 The government argues that even if we apply Yang II, we should defer to Guam's Appellate Division's interpretation of local law. According to the government, the Appellate Division has addressed the issue presented in this appeal in three cases since the Yang II decision. See Guam v. Kitano, D.Guam App.Div. No. 87-18A, Guam v. Castro, D.Guam App.Div. No. 87-33A, Guam v. Dalmal, D.Guam App.Div. No. 88-8A. In these three cases, the trial court gave a nonstatutory instruction like the one given in this case. No contemporaneous objection was

made. Distinguishing Yang II, the Appellate Division rejected the reversible error standard.

The government's argument is remarkable. The government "concedes that this is directly in conflict with Yang II but believes that the en banc panel was not aware of many important factors in reaching its conclusion of a 'no-deference' standard of review." The government proceeds to devote twelve pages of its opening brief explaining why the en banc court erred.

The court in Yang II stated unequivocally: "[W]e hold that the proper standard of review for questions of law is a de novo standard, which accords no deference to interpretations of local law by the Appellate Division of the District Court of Guam." Yang II, 850 F.2d at 511. Of course, we are bound by that decision. Sitting as a three-judge panel, we have no authority to reconsider the law established in an en banc case. Indeed, we could not reconsider the law in that case were it decided by a three-judge panel, let alone an en banc panel. Christoffel v. E.F. Hutton & Co., 558 F.2d 665, 667 (9th Cir. 1978).

III

The salient facts in our unanimous en banc decision in Yang II mirror the facts in the case before us. Yang II concluded that, under the circumstances of that case, "an objection would have been futile because the trial court would not have changed its decision." Yang II, 850 F.2d at 512 n. 8. The court thus reviewed the trial court's "beyond a reasonable doubt" instruction for reversible error and reversed the conviction. On the authority of Yang II, we are compelled to overturn defendant's conviction on all counts.[5]

Reversed and remanded for a new trial.

---

5 Alternatively, we reverse the conviction because of the trial court's erroneous admission of certain hearsay evidence. The government called Manuel Leon Guerrero ("Guerrero"), the brother of Cruz, to testify about a conversation he had with defendant. Guerrero spoke with his brother, Cruz, after the slaying but before talking to the detective. When Guerrero refused to testify, the government instead called to the stand a detective to whom this conversation was related. At the time Guerrero gave this information to the detective, he himself was being investigated for allegedly tampering with the vehicle identification numbers on the

jeep defendant drove on the night of the slaying, a felony under Guam law.

Contrary to the government's position, the detective's testimony is not admissible under 6 Guam Code Ann. §804(b)(5), the "catch-all" hearsay exception (which is based on Fed.R. Evid. 804(b)(5)). Prerequisite to this exception's application, the hearsay evidence must have "equivalent circumstantial guarantees of trustworthiness." Id. The Appellate Division of Guam concluded that the circumstances surrounding Guerrero's statements to the detective failed to satisfy this prerequisite. We agree.

However, we disagree with the Appellate Division's conclusion that the error was harmless. See United States v. Wellington, 754 F.2d 1457, 1465 (9th Cir.) (employing harmless error review), cert. denied, 474 U.S. 1032, 106 S.Ct. 573, 88 L.Ed.2d 573 (1985). The Appellate Division relied on the testimony of two witnesses in making this determination. One was an eyewitness -- Cruz, who actually handed the knife to Christopher, who then gave it to the defendant. Cruz, therefore, was implicated in the crime. The other witness, who testified about incriminating statements purportedly made by defendant, was a fellow inmate of defendant.

We are unable to say, on the strength of the testimony of these two men, that the admission of the detective's testimony, which directly implicated defendant without cross-examination, was harmless error. The facts surrounding their testimony raise very serious doubts about their trustworthiness. Accordingly, we find the error to require reversal. See Gaines v. Thieret, 846 F.2d 402, 406-07 (7th Cir. 1988) (no harmless error where remaining evidence was of questionable credibility).

Appendix L

DISTRICT COURT OF GUAM
TERRITORY OF GUAM
APPELLATE DIVISION

PEOPLE OF THE TERRITORY OF GUAM,	)	Crim. Case No. 88-00004A
Plaintiff-Appellee,	)	
vs.	)	ORDER
HENRY BABAUTA SANTOS,	)	
Defendant-Appellant.	)	

This appeal was taken off calendar pending resolution by the Ninth Circuit on the propriety of giving a non-statutory jury instruction on reasonable doubt regardless of whether the statutory instruction was requested by defense counsel and regardless of whether an objection was raised in the trial court.

Citing the earlier case of People of the Territory of Guam v. Yang, 850 F.2d 507 (9th Cir. 1988) (en banc), the Ninth Circuit in People of the Territory of Guam v. Ibanez, 880 F.2d 108 (9th

Cir. 1989), held that it is reversible error to give a non-statutory reasonable doubt jury instruction.

Based on Yang and Ibanez this matter is REVERSED and remanded for trial.

IT IS SO ORDERED.

Date: March 27, 1990.

CRISTOBAL C. DUENAS
Senior Judge

Appendix M

DISTRICT COURT OF GUAM
TERRITORY OF GUAM
APPELLATE DIVISION

PEOPLE OF THE TERRITORY OF GUAM, Plaintiff-Appellee, vs. IGNATIUS ANDREW SMITHERS, Defendant-Appellant.	)	Crim. Case No. 88-00034A ORDER

This appeal was taken off calendar pending resolution by the Ninth Circuit on the propriety of giving a non-statutory jury instruction on reasonable doubt regardless of whether the statutory instruction was requested by defense counsel and regardless of whether an objection was raised in the trial court.

Citing the earlier case of People of the Territory of Guam v. Yang, 850 F.2d 507 (9th Cir. 1988) (en banc), the Ninth Circuit in People of the Territory of Guam v. Ibanez, 880 F.2d 108 (9th

Cir. 1989), held that it is reversible error to give a non-statutory reasonable doubt jury instruction.

Based on Yang and Ibanez this matter is REVERSED and remanded for trial.

IT IS SO ORDERED.

Date: March 27, 1990.

CRISTOBAL C. DUENAS
Senior Judge

Appendix N

DISTRICT COURT OF GUAM
TERRITORY OF GUAM
APPELLATE DIVISION

PEOPLE OF THE TERRITORY OF GUAM,	)	Crim. Case No. 88-00046A
Plaintiff-Appellee,	)	
vs.	)	ORDER
STEVEN MILLER,	)	
Defendant-Appellant.	)	

This appeal was taken off calendar pending resolution by the Ninth Circuit on the propriety of giving a non-statutory jury instruction on reasonable doubt regardless of whether the statutory instruction was requested by defense counsel and regardless of whether an objection was raised in the trial court.

Citing the earlier case of People of the Territory of Guam v. Yang, 850 F.2d 507 (9th Cir. 1988) (en banc), the Ninth Circuit in People of the Territory of Guam v. Ibanez, 880 F.2d 108 (9th

Cir. 1989), held that it is reversible error to give a non-statutory reasonable doubt jury instruction.

Based on Yang and Ibanez this matter is REVERSED and remanded for trial.

IT IS SO ORDERED.

Date: March 27, 1990.

CRISTOBAL C. DUENAS
Senior Judge

Appendix O

DISTRICT COURT OF GUAM
TERRITORY OF GUAM
APPELLATE DIVISION

PEOPLE OF THE TERRITORY OF GUAM,	)	Crim. Case No. 88-00047A
Plaintiff-Appellee,	)	
vs.	)	ORDER
CHERYL MILLER,	)	
Defendant-Appellant.	)	

This appeal was taken off calendar pending resolution by the Ninth Circuit on the propriety of giving a non-statutory jury instruction on reasonable doubt regardless of whether the statutory instruction was requested by defense counsel and regardless of whether an objection was raised in the trial court.

Citing the earlier case of People of the Territory of Guam v. Yang, 850 F.2d 507 (9th Cir. 1988) (en banc), the Ninth Circuit in People of the Territory of Guam v. Ibanez, 880 F.2d 108 (9th

Cir. 1989), held that it is reversible error to give a non-statutory reasonable doubt jury instruction.

Based on Yang and Ibanez this matter is REVERSED and remanded for trial.

IT IS SO ORDERED.

Date: March 27, 1990.

CRISTOBAL C. DUENAS
Senior Judge

Appendix P

DISTRICT COURT OF GUAM
TERRITORY OF GUAM
APPELLATE DIVISION

PEOPLE OF THE TERRITORY OF GUAM,	)	Crim. Case No. 88-00026A
Plaintiff-Appellee,	)	
vs.	)	ORDER
JUAN FRANCISCO BORJA,	)	
Defendant-Appellant.	)	

This appeal was taken off calendar pending resolution by the Ninth Circuit on the propriety of giving a non-statutory jury instruction on reasonable doubt regardless of whether the statutory instruction was requested by defense counsel and regardless of whether an objection was raised in the trial court.

Citing the earlier case of People of the Territory of Guam v. Yang, 850 F.2d 507 (9th Cir. 1988) (en banc), the Ninth Circuit in People of the Territory of Guam v. Ibanez, 880 F.2d 108 (9th

Cir. 1989), held that it is reversible error to give a non-statutory reasonable doubt jury instruction.

Based on Yang and Ibanez this matter is REVERSED and remanded for trial.

IT IS SO ORDERED.

Date: March 27, 1990.

CRISTOBAL C. DUENAS
Senior Judge

Appendix Q

8 Guam Code Annotated

§90.19. Jury Instructions; Time, Presentation. (a) If the trial be before the court with a jury, all requests for instruction on points of law must be made to the court and all proposed instructions must be delivered to the court before commencement of argument.

(b) Copies of such requests shall be furnished to adverse parties at the same time they are delivered to the court. Before the commencement of the argument, the court, on request of counsel, shall (1) decide whether to give, refuse, or modify the proposed instruction; (2) decide which instructions shall be given in addition to those proposed, if any; and (3) advise counsel of all instructions to be given.

(c) Opportunity shall be given to object to any proposed instruction before it is given, out of the hearing of the jury and, on request of any party, out of the presence of the jury. However, no party may assign as error any portion of an instruction or omission therefrom unless he objects thereto stating distinctly the matter to which he objects and the grounds of his objection.

(d) Notwithstanding Subsection (b), if, during the argument issues are raised which have not been covered by instructions given or refused, the court may, on request of counsel, give additional instructions on the subject matter thereof.

8 Guam Code Annotated

§130.50. "De Minimis" Rule: "Plain Error" Rule.
(a) Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Appendix S

8 Guam Code Annotated

Section 5.23. "Shall and "May" Defined.

"Shall" is mandatory and "may" is permissive.

Appendix T

Guam Code of Civil Procedure

§82. Original Jurisdiction of the Superior Court. The Superior Court shall have original jurisdiction in all cases arising under the laws of Guam, civil or criminal, in law or equity, regardless of the amount in controversy, except for causes arising under the Constitution, treaties, laws of the United States, and any matter involving the Guam Territorial Income Tax.

NO. 89-1609

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1989

THE PEOPLE OF THE TERRITORY OF GUAM,

Petitioners,

v.

IRVIN IBANEZ,
RAMON ALDAN CASTRO,
PEDRO V. DALMAL,
NORBERT BOTELHO,

Respondents.

RESPONDENT IRVIN IBANEZ'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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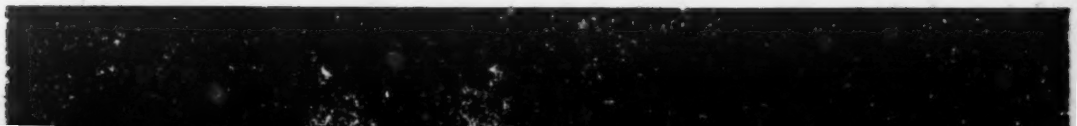


WHY THE CAUSE SHOULD NOT BE REVIEWED BY THE SUPREME COURT.

I. THIS CASE PRESENTS NO SPECIAL OR IMPORTANT REASONS JUSTIFYING REVIEW BY WRIT OF CERTIORARI.

Rule 17.1 by the Supreme Court Rules makes it clear that review by Writ of Certiorari "is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor". In subsections (a), (b), and (c) of Rule 17.1, this court has described the "character of reasons" that will be considered in determining whether a particular Petition for certiorari sets forth special and important reasons why the Court should exercise its discretion to hear a case:

> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Under Supreme Court Rule 54, the term "state court" does not include "territorial courts".

None of the three questions to which answers are sought in this court are of the kind which are appropriate for Supreme Court review.

II. THE REASONABLE DOUBT QUESTION

Petitioner's basic argument under this section of its Petition is that since states can constitutionally limit the right to appeal an erroneous jury instruction where no objection was interposed, the Ninth Circuit's so called "Scott exception" [United States v. Scott, 425 F.2d 55 (9th Cir. 1970)] is violative of Guam law. Contrary to Petitioner's contention, the two rules are not inconsistent. Moreover, the interplay between the two rules does not present a "federal question" within the meaning of Rule 17. Therefore, under Rule 17 of this Court's Rules, the Petition for Certiorari should be denied.

The decisions in each of Respondents' cases followed Guam v. Yang, 850 F.2d 507 (9th Cir. 1988) (en banc) ("Yang II"); see also, Guam v. Yang, 800 F.2d 945 (9th Cir. 1986) ("Yang I"), Opinion withdrawn by 833 F.2d 1379 (9th Cir. 1987), reh. en banc in Yang II. In Yang II, the Ninth Circuit reversed a conviction where a reasonable doubt jury instruction was given which was dramatically different than Guam's statutory reasonable doubt jury instruction. 8 G.C.A. § 90.23(a) (1985); Yang II, 850 F.2d at 513. The Ninth Circuit in Yang II held that contemporaneous objection to a jury instruction is unnecessary when a "wall of binding authority squarely precludes the trial court from correcting an error in light of the objection". Yang II, 850 F.2d at 512, n.8.

Just as in Yang II, the juries in each of Respondents' trials were given a non-statutory reasonable doubt jury instruction. Respondent Irvin Ibanez faced the same wall of binding authority as did Yang. Respondent's trial was conducted before the same judge as Yang's.

Petitioner, however, claims the Ninth Circuit should not have applied the Scott exception because the "solid wall of authority" identified in Yang did not exist as the time of Respondent Irvin Ibanez's trial. Essentially, Petitioner wants Yang II reversed. If that is true, Petitioner should have sought review of that decision by certiorari, but it never did.

Petitioner argues that the wall of authority faced by Respondent at his trial, which was identical to the wall of authority in Yang II, was a wall thin enough to be successfully challenged. Petitioner says Judge Ferguson's "vigorous dissent" in Yang I was indicative of how thin the wall of authority really was. Additionally, Petitioner notes that "in Dec. 1987, the Ninth Circuit panel decision in Yang I was withdrawn (833 F.2d 1379), and a Petition for Rehearing was granted. After this point, that 'solid wall' simply did not exist". This may be true; however, Respondent Ibanez's trial took place in late 1986; the erroneous reasonable doubt instruction in his trial was given on October 16, 1986, and Petitioner's argument is seen to be factually specious. Similarly, Petitioner's contention that a "vigorous dissent" precluded application of the Scott exception is legally specious.

In Petitioner's view, trial counsel cannot simply ascertain the existence of a wall of authority; counsel must measure the width of the wall. By implication, a wall of authority two Ninth Circuit opinions thick qualifies for the Scott exception while a majority opinion with a "vigorous dissent" does not. The primary problem with Petitioner's argument is that it would lead to substantial uncertainty on the part of Defendants. Under Petitioner's proposed rule, trial counsel are forced to object to each and every ruling at trial, even when a wall of authority makes the objection frivolous, for fear that some day some court might indicate the wall was thinner than it seemed to be at the time.

As stated in Scott:

> Under these circumstances, were we to insist that an exception be taken to save the point for appeal, the unhappy result would be that we would encourage defense counsel to burden district courts with repeated assaults on then-settled principles out of hope that those principles will be later overturned, or out of the fear that failure to object might subject counsel to a later charge of incompetence.

(425 F.2d at 57-58).

It is only by hindsight that trial counsel are able to tell just how thick a "solid wall of authority" was. By means of the same hindsight, Petitioner now seeks review by certiorari.

The Scott decision, as applied in Yang II, creates certainty and avoids the burden on trial courts created by repeated assaults on settled principles of law. Petitioner's new interpretation of Scott would be impossible to apply, except in hindsight, and would eviscerate a crucial and necessary exception to the requirement of contemporaneous objection.

Finally, Petitioner makes much of the fact that Respondent did not initially "request" the statutory jury instruction on reasonable doubt. (Petition at P. 13-14.) Petitioner exaggerates the significance of expressing a preference for a particular jury instruction. Under Guam law, unless the Scott exception applies, "no party may assign as error any portion of any instruction or omission therefrom unless he objects thereto, stating distinctly the matter to which he objects and the grounds for his objection." 8 G.C.A. § 90.19(c). The statute requires objection, not a stated preference. In Yang II, the Ninth Circuit held that an objection was unnecessary in light of the solid wall of authority which, at the time, endorsed the trial judge's predilection for the nonstatutory jury instruction. In a situation where an objection, which preserves an issue for appeal, is unnecessary, the expression

of a "preference" would most certainly be futile. Such a "preference" has no legal significance under Guam law or under the holding of Yang II.

III. THE HARMLESS ERROR ISSUE.

A. An Evidentiary Ruling Is Not A "Special and Important Reason" Which Justifies Supreme Court Review.

The erroneous admission of hearsay testimony at Respondent's trial is not an issue wherein "one federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter", nor is it one wherein "a federal court has decided a federal question in a way in conflict with a state court of last resort". [Supreme Court Rule 17.1(a)]. It is not one wherein a "state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals". [Supreme Court Rule 17.1(b)]. Finally, the question is not one wherein "a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this court, or has decided a federal question in any way in conflict with applicable decisions of this Court". [Supreme Court Rule 17.1(c)]. Rather, the Ninth Circuit's ruling is one which Petitioner simply doesn't like. Indeed, it is ironic that the party who invited the error by insisting on the admission of the evidence at trial (over vigorous objection) is now the party seeking Supreme Court review on the grounds that the evidence was harmless.

B. A De Novo Review of the Harmless Error Issue Was Conducted.

Petitioner argues that the Ninth Circuit failed to follow its own concept of "de novo review" as described in Campbell v. U.S. Dist. Ct. for the N. Dist. of California, 501 F.2d 196, 206 (9th Cir. 1974). Campbell held that a court conducts a sufficient de novo review if it reads the questioned evidence before making its finding. Obviously, that is exactly what the Ninth Circuit did on Respondent's appeal. (See Petitioner's Appendix, P. 17(a)-20(a); P. 32(a)-33(a), f.n. 5).

IV. IT IS NOT ERROR FOR THE NINTH CIRCUIT CONDUCT A DE NOVO REVIEW OF DISTRICT COURT INTERPRETATIONS OF GUAM LAW.

Of the three questions of which review is sought, this is the least deserving of Supreme Court attention under the guidelines set forth in Supreme Court Rule 17. It is also the least meritorious.

Congress has expressly required that the relationship between Guam's local court and the federal courts be the same as that between state courts and federal courts. (48 U.S.C. §1424-2). In Matter of McLinn, 739 F.2d 1395 (9th Cir. 1984) (en banc), no mention of which is made by Petitioner, the Ninth Circuit held that interpretations of state law by local district court judges should be reviewed de novo. In People v. Yang 850 F.2d. 507, 510 (9th Cir. 1988), the Ninth Circuit held that the statutory scheme establishing Guam's court system and the reasoning of its decision in Matter of McLinn compelled the adoption of a de novo standard of review for determinations of Guam law by the Appellate Division of District Court of Guam. In so doing, the Ninth Circuit noted that use of the de novo standard would be consistent with the Third

Circuit's treatment of a similar system of courts in the Virgin Islands. [See Saludes v. Ramos, 744 F.2d 992 (3rd Cir. 1984)]. Despite the clarity and logical necessity of this holding, Petitioner seeks to obfuscate the issue by citing a series of Ninth Circuit cases at Page 26-27 of its Petition which formerly stood for the proposition that deference must be given to Guam court interpretations of Guam law. Each of these cases was decided before Matter of McLinn and Yang II, and those decisions are no longer the law. Petitioner never sought review by certiorari of Yang II. It is only now, when faced with the unhappy prospect of a spate of retrials, that it seeks such review. Petitioner was content with the de novo standard until it worked to its disadvantage, and it should not be heard to complain now.

V. CONCLUSION.

None of the issues presented in the Petition for Certiorari are worthy of Supreme Court review. Additionally, each is factually and legally without merit. For the foregoing reasons, Respondent Irvin Ibanez respectfully requests that the Petition for a Writ of Certiorari be denied as to all Respondents herein, and in particular that it be denied on the grounds peculiar to him, as set forth in Section III hereof.

/s/ Irvin Ibanez 3/14/90

IRVIN IBANEZ, Respondent

TLR/tab
F# 3720
D# T3720.013

NO. 89-1609

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

PEOPLE OF THE TERRITORY OF GUAM, Petitioner, vs. IRVIN IBANEZ, RAMON ALDAN CASTRO, PEDRO V. DALMAL, NORBERT BOTELHO, Respondents.	AFFIDAVIT OF MAILING

I, David A. Mair, Esq., having first been duly sworn, do hereby depose and state:

1. That I am a member of the bar of this Court, although I have no relationship with and do not represent any of the parties involved in this proceeding;

2. That Respondent Irvin Ibanez's Brief in Opposition to Petition for Certiorari in this case and his Motion for Leave to Proceed In Forma Pauperis were deposited in a United Sates mailbox, first class postage prepaid, addressed to the Clerk of this Court, on the 14th day of May, 1990; and

Further, your affiant sayeth not.

By: _____
DAVID A. MAIR, ESQ.

SUBSCRIBED AND SWORN to before me the date written above.

BY: _____
Notary Public

MARY A. CRUZ
NOTARY PUBLIC
In and for the Territory of Guam
My Commission Expires: July 10, 1993

TLR/tab
F# 3720
D# 73720.015

NO. 89-1609

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

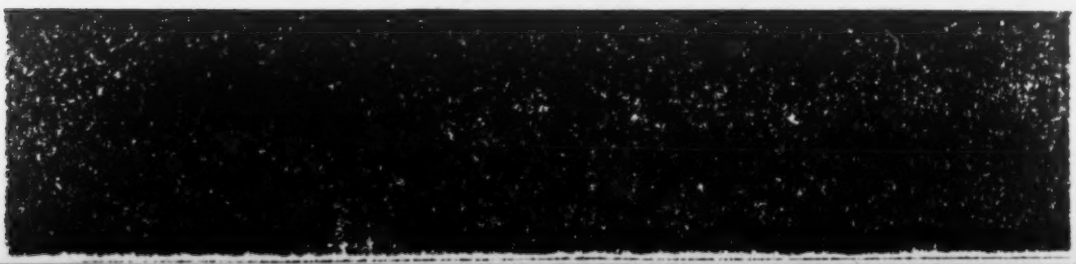
PEOPLE OF THE TERRITORY OF GUAM, Petitioner, vs. IRVIN IBANEZ, RAMON ALDAN CASTRO, PEDRO V. DALMAL, NORBERT BOTELHO, Respondents.	**AFFIDAVIT OF SERVICE**

TERRITORY OF GUAM)
) ss:
City of Agana)

I, Thomas L. Roberts, Esq., having represented Respondent Irvin Ibanez before the Appellate Division of the District Court of Guam and before the Ninth Circuit Court of Appeals, but having not yet been admitted to practice before the United States Supreme Court, after being duly sworn, do hereby depose and state upon my oath:

1. That on Monday, May 14, 1990, I caused Respondent's Motion for Leave to Proceed in Forma Pauperis and Brief in Opposition to the Government of Guam's Petition for Writ of Certiorari in the above-captioned case to be delivered to the Office of the Attorney General, Prosecution Division, Suite 212A, Julale Center, Agana, Guam 96910, counsel for Petitioner;

2. That I caused the same documents to be served upon counsel for Ramon Aldan Castro by hand delivery to the law offices of Robert Hartsock, Esq., at his office located at Suite 301, GMLP Building, 230 West Soledad Avenue, Agana, Guam;



3. That I caused the same documents to be served upon David Terlaje, counsel for Pedro V. Dalmal, by hand delivery to his office at Suite 215, Union Bank Building, 194 Hernan Cortes Avenue, Agana, Guam 96910;

4. That I caused the same documents to be served upon Howard Trapp, counsel for Norbert Botelho, by hand delivery to his office at Howard Trapp Incorporated, 200 Saylor Building, 139 Chalan Santo Papa, Agana, Guam 96910; and

Further, your affiant sayeth naught.

Dated this 14th day of May, 1990.

THOMAS L. ROBERTS, ESQ.

SUBSCRIBED AND SWORN to before me the date above written.

By: _____
Notary Public

VELMA S. MENDOZA
NOTARY PUBLIC IN AND FOR
THE TERRITORY OF GUAM
MY COMMISSION EXPIRES
MARCH 27, 1993

TLR/tab
FB 3720
D# T3720.011